IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Suit No. 12 of 1999

Judgment reserved on 11.10.2006

Date of decision 3.11.2006

Jatender Nath Sharma & another …Plaintiffs.

Versus

Highseas Holding Pvt. Ltd. & others …Defendants.

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?

For the plaintiffs: Mr. B.K. Sood, Advocate.

For defendants : Mr. R.L. Sood, Sr. Advocate, with Ms. Sanjivani & Mr. Vikas Rajput, Advocates.

Surjit Singh, Judge

Plaintiffs have filed this suit for specific performance of agreement dated 28.8.1995, whereby defendant No. 1, through its Director, agreed to allot flat No. C-12, Block-C, first floor, Dilshant Estate, Bharari Shimla and also for a direction to defendants No. 1 & 2 to hand over vacant physical possession of the said flat to the plaintiffs and also to execute and get registered a sale deed in respect of the said flat.

Whether reporters of Local Papers may be allowed to see the Judgment?

2. Cause of action, as disclosed in the plaint, may be summed up thus. Defendant No. 1 offered for allotment some flats, which it planned to construct in Dilshant Estate, Bharari Shimla. The plaintiffs made enquiries with defendant No. 1, who vide letter dated 25.8.1995, addressed to plaintiff No. 1, sent plan of Block-C, along-with the list of flats, which were available for allotment / sale. One of the flats, included in the list, was flat No. C-12, having 990 square feet area. The plaintiffs applied for the said flat No. C-12 on 28.8.1995 and also paid to defendant No. 1 a sum of Rs.50,000/- in cash. Another sum of Rs.10,000/- was paid through bank draft dated 30.8.1995. Defendant No. 1 acknowledged the receipt of both the amounts through receipt No. 227, dated 30.8.1995. Vide letter dated 6.11.1995, defendant No. 1 demanded an additional amount of Rs.50,000/-, by means of a draft, to make up the deficiency in the earnest money and assured to issue allotment letter on the receipt of the draft for the said amount. The plaintiffs, vide bank draft dated 7.12.1995, paid Rs.50,000/- to defendant No. 1 against receipt dated 11.12.1995, issued by the said defendant. On 9.9.1996 the plaintiffs were sought to be delivered a cheque for Rs.60,000/- by defendant No. 1, on account of refund of the booking money, through a letter and along-with that letter there was a draft letter purporting to have been addressed by plaintiff No. 1 to defendant No. 1, thereby expressing his desire for the cancellation of the booking due to delay in construction. The plaintiffs did not sign that draft letter and sent reply to the aforesaid letter of defendant No. 1 on 17.9.1996 through an Advocate, conveying thereby that they had never asked for the cancellation of the booking nor were they agreeable to any such proposal of cancellation of booking and also required defendant No. 1 to issue allotment letter in

respect of the booked flat. That letter was duly received by defendant No. 1. Thereafter the plaintiffs received two letters dated 14.9.1996 and 26.9.1996 from defendant No. 1, reply to which was sent by the plaintiffs on 14.10.1996 through an Advocate and in that letter the contents of the aforesaid two letters, received from defendant No. 1, were denied.

3. On 2.12.1996 the plaintiffs received from defendant No. 1 another letter in which it was stated that in case the plaintiffs were ready to retain the booking, they should return the cheque for Rs.60,000/- and acknowledge the refund of Rs.50,000/-. The plaintiffs had not been refunded any amount of Rs.50,000/- and thus the demand for acknowledgement of the refund of the said amount, made by defendant No. 1, was unwarranted, illegal and hence unacceptable to the plaintiffs. The plaintiffs responded to that letter, vide letter dated 6.12.1996, through an Advocate. It was denied in the said reply letter that a sum of Rs.50,000/-, out of the booking amount, had been refunded.

4. Defendant No. 1 at one point of time took the stand that construction of the flat had been delayed due to stay granted by the Hon'ble High Court in CWP No. 62/94 and that cancellation of the flat was contemplated by defendant No. 1 in good faith and in the interest of the plaintiffs. Defendant No. 1 kept silent for about two years after the plaintiffs sent to it through an Advocate letter dated 6.12.1996 denying therein the refund of Rs.50,000/-. The plaintiffs then sent a notice dated 7.7.1998 to defendant No. 1 calling upon it to issue the allotment letter in respect of the booked flat. When there was no response, the plaintiffs issued another notice dated 1.12.1998, wherein inter alia it was stated that in case no positive action was taken on the demand for issuance of allotment letter,

the plaintiffs would seek their legal remedy. Defendant No. 1 responded to this letter, vide reply dated 7.12.1998 / 22.12.1998 through an Advocate and also sent a draft for Rs.76,125/-, which included Rs.60,000/- on account of part of earnest money and Rs.16,125/- on account of interest accrued thereon. In the said reply it was denied that there was a concluded contract between the plaintiffs and defendant No. 1, the plaintiffs had no right to have the flat as no allotment letter had been issued and no agreement had been signed between the parties and that due to recommendations of the Environment Commission, the construction of block-C and block-D had been initially stayed and then cancelled. It is alleged that the plaintiffs had always been ready and willing to perform their part of the agreement.

5. Initially the suit was filed only against defendant No. 1. Defendant No. 1 in its written statement took the plea that defendant No. 2 Air Marshal G.B. Singh (retired) was the owner of the entire Dilshant Estate, including flat No. C-12 and that on account of his non-impleadment as defendant, the suit was bad. It was also disclosed in the written statement that the flat, in question, stood allotted to defendant No. 3 Raman Wasan. The plaintiffs then made an application, under Order 1 Rule 10 of the Code of Civil Procedure, seeking leave of the Court to add the said persons as defendants and suitably amend the plaint. The prayer was granted and amended plaint was filed.

6. In the amended plaint it was stated that defendant No. 1 never indicated that defendant No. 2 had anything to do with flat No. C-12 or other flats constructed / planned to be constructed in Dilshant Estate, leave alone informing that he was the owner of the flat being constructed / planned to

be constructed and it was only in the written statement to the initial plaint that defendant No. 1 for the first time claimed that defendant No. 2 was the owner of the property. It was alleged that there had not been any agreement between the plaintiffs and defendant No. 2 nor did the plaintiffs have any dealing or negotiations or interaction with defendant No. 2 and that defendant No. 1 had been holding out right up to the time of filing the written statement that it alone had the authority to negotiate and make agreements and also to issue allotment letters.

7. The addition that has been made in the amended plaint, on account of impleadment of defendant No. 3, is that defendant No. 1 never disclosed to the plaintiffs that the flat, in question, had been sold to defendant No. 3 and that it was for the first time in the written statement to the original plaint that such indication was given. It is alleged that as a matter of fact right up to the date of the filing of the suit defendant No. 1 had been claiming that the construction of the flat had been initially stayed and then cancelled by the Hon'ble Court.

8. Separate written statements have been filed by the defendants. Defendant No. 1 has raised a number of preliminary objections, besides contesting the claim on merits. It is alleged that there being no written agreement between the plaintiffs and defendant No. 1, the suit for specific performance is not maintainable. The suit is alleged to be barred by time as it seeks to enforce an agreement dated 28.8.1995 while the date of its institution is 1.3.1999. The plaintiffs are alleged to be not entitled to the discretionary relief of specific performance as they have not approached the Court with clean hands. The suit for specific performance is also alleged to be not maintainable, because one of the conditions of

allotment, i.e. condition No. 11, provides for refund of the booking money with interest at the rate of 9%. The frame of the suit is also alleged to be bad. Further it is alleged that decree for specific performance, if passed, would be inexecutable, because the defendant being not the owner of the property, cannot execute any deed of conveyance in favour of the plaintiffs. The plaintiffs are alleged to be estopped to file the suit because of their acts, deeds and conduct and delay and latches.

9. As regards the merits, it has been admitted that defendant No. 1 had planned to construct some flats in Dilshant Estate and had offered the same to prospective buyers. However, it is alleged that defendant No. 2 is the owner of the property and he alone has the authority to execute the deed of conveyance. It is alleged that there had not been any concluded agreement between the parties and that the plaintiffs only applied for tentative allotment of flat No. C-12. It has been admitted that a letter was written to the plaintiffs on 6.11.1995 demanding another sum of Rs.50,000/- with assurance that letter of allotment would be issued, but it is alleged that that letter does not have the effect of bringing into existence a concluded agreement capable of specific performance. It has been alleged that on 9.9.1996 the entire amount paid by the plaintiffs was refunded to them and they were called upon to execute a letter for cancellation of booking, but the plaintiffs retained the money refunded to them and at the same time refused to sign the letter for cancellation of the booking. It is alleged that when the money was refunded and the plaintiffs were called upon to execute the letter of cancellation of booking, some writ petition was pending in the Hon'ble High Court in which the construction of flats in Block-C had been stayed and that is why the plaintiffs were refunded the booking amount and

called upon to execute the letter of cancellation and that this was done after having received a telephonic request from the plaintiffs for cancellation. At the same time it is alleged that the defendants wanted to offer an alternative flat to the plaintiffs on revised rates, but the plaintiffs were not interested. It is also alleged that Block-C was later on constructed and flat No. C-12 was allotted to defendant No. 3 and its possession was also delivered to him in October, 1998. It has been alleged that the plaintiffs had been aware from the very beginning that defendant No. 2 was the owner of the property and that he alone could execute a binding agreement with regard to the flat and no agreement having been executed between the plaintiffs and defendant No. 2, the plaintiffs were not entitled to any relief, except the refund of the booking amount, which stood refunded to them. It is alleged that even according to the plaintiffs' own assertion, formal agreement had not been executed between them and defendant No. 1 and that in fact even the stage for execution of such an agreement had not reached, as before the execution of an agreement, issuance of letter of allotment was required and no such letter had been issued.

10. Defendant No. 2 has also raised some preliminary objections in addition to contesting the claim of the plaintiffs on merits. It is alleged that defendant No. 2, being the owner of the property and there being no agreement between the plaintiffs and defendant No. 2, the suit for specific performance is not maintainable. It is also alleged that the claim is barred by limitation especially against defendant No. 2, who has been impleaded after the institution of the suit. The plaint is alleged to lack material particulars. Plea of estoppel has also been raised. The suit is alleged to be bad for misjoinder of defendants No. 2 and 3.

11. On merits it is stated that defendant No. 2 is the exclusive owner of the property, in question, and there being no agreement between him and the plaintiffs, the latter have no enforceable cause of action. Further it is stated that the plaintiffs themselves have pleaded that there was no concluded agreement between them and defendant No. 1 and for this reason also the suit is liable to be dismissed.

12. Defendant No. 3 has alleged that he is a bona fide purchaser for consideration and hence the suit is liable to be dismissed. He has also raised pleas of limitation, estoppel, maintainability of the suit, misjoinder of defendants No. 2 and 3 and the plaintiffs having no enforceable cause of action because of there being no agreement between them and defendant No. 2, who is alleged to be the real owner of the property. On merits, it is alleged that defendant No. 3 has spent huge amount of money to make the flat habitable.

13. Plaintiffs have filed replications to all the three written statements in which they have reiterated the averments made in the plaint and denied those made in the written statements.

14. This Court framed the following issues on the pleadings of the parties, vide order dated July 14, 2000:-

> "1. Whether there has been an agreement to sell between the parties, if so, what are the terms thereof? OPP.
>
> 2. Whether the plaintiffs are entitled to the relief of specific performance of the agreement to sell? OPP.
>
> 3. Whether the plaintiffs are entitled to the possession of the suit property? OPP
>
> 4. Whether the suit is within time? OPP

5. Whether the plaintiffs are guilty of suppression of material facts, as alleged? If so, to what effect? OPD-1

6. Whether the suit is liable to be dismissed in view of condition No. 11 of the application dated 28.8.1995? OPD-1

7. Whether the suit in the present form is not maintainable, as alleged? OPD

8. Whether the plaintiffs are estopped from filing the suit, as alleged? OPD

9. Whether the suit is bad for mis-joinder of defendants 2 & 3, as alleged? OPD

10. Whether the suit lacks essential pleadings, as alleged? If so, to what effect? OPD

11. Whether the defendant No. 3 is a bonafide purchaser for value without notice, as alleged? If so, to what effect? OPD

12. Relief."

15. Parties have gone to trial. I have heard the learned counsel for the parties and also gone through the record. My issue-wise findings are as follows.

Issue No. 1

16. The plea taken by the defendants is that defendant No. 2, being the owner of the property, alone could have entered into an agreement for sale of the flats and since there was no agreement between the plaintiffs and defendant No. 2 for the sale of flat No. C-12 in Block-C of

Dilshant Estate, there is no legally enforceable agreement and hence the plaintiffs are not entitled to a decree for specific performance of the alleged agreement.

17. As a matter of fact, the plaintiffs have sought specific performance of the agreement dated 28.8.1995, which they entered into with defendant No. 1 and the said agreement, as would be seen from the evidence being referred to and discussed hereinafter, is for the allotment of the flat and not for direct sale. One of the Directors of defendant No. 1, namely Capt. P.S. Chimni, while in the witness box and under cross-examination by the plaintiffs, admitted that advertisement had appeared in various newspapers at different times inviting applications for allotment / sale of flats. He was called upon to produce the newspapers in which those advertisements appeared. He produced three of such newspapers, which are Ext. DW-3/A, DW-3/B and DW-3/C. These advertisements appeared in the newspapers dated May 13, 2000, May 7, 1999, March 24, 2001, respectively, whereas admitted facts are that the application for allotment of flats was made by the plaintiffs in the year 1995. In two of these advertisements, i.e. Exts. DW-3/B and DW-3/C, only the name of defendant No. 1 appears as the person, who is to be contacted for details. Defendants have also placed on record a cutting from the newspaper and claim that this appeared in the issue dated 20.5.1994 of the Times of India. They did not, however, prove this cutting. As per this cutting, those who could be contacted for the booking of flats are defendant No. 1, defendant No. 2 and some other persons. There is another cutting, which is claimed to be from the issue dated 21.5.1994 of the Economic Times. This also pertains to the flats in Dilshant Estate and the persons, who could be

contacted for booking, as named in this advertisement, are the same as in the aforesaid cutting from the Times of India.

18. From the aforesaid advertisements it is clear that defendant No. 1 was one of the persons who could be contacted for booking of flats. The fact that the names of defendant No. 1 and defendant No. 2 and some other persons appeared in the same advertisements is enough to hold that defendant No. 2 had authorized defendant No. 1 to accept applications for booking of flats.

19. There is some more evidence, which is very specific on the point. Ext. PW-1/A is a letter, which was written by DW-3 Shri P.S. Chimni, a Director of defendant No. 1, to plaintiff J.N. Sharma, whereby list of flats of Block-C was sent to him and he was informed that the booking would be open within a period of one month. Then there is an application on a printed format, which the plaintiffs submitted to the defendant. A copy of the application, proved by the plaintiffs, is Ext. PW-1/A-2. Defendants produced the original application, which was shown to DW-3 P.S. Chimni in the cross-examination and was exhibited as 'PB'. This application is on printed formant. Name of defendant No. 1 is printed as the person to whom it is addressed. Plaintiffs submitted this application to defendant No. 1. DW-3 admits this fact. Along-with this application, a bank draft for Rs.10,000/- was also submitted. The application was for allotment of flat No. C-12 in Block C, first floor. The payment plan that had been opted by the plaintiffs was 'B' as per column No. 6 of this application. Approximate area was 990 square feet. The date of making of the application is though not mentioned, the date of its acceptance by defendant No. 1 is there. The same is '28.8.1995'. This application was accepted by an authorized

signatory of defendant No. 1. That means the application, submitted by the plaintiffs for allotment of flat No. C-12 on the first floor of Block-C, had been accepted by an authorized signatory of defendant No. 1. The salient terms and conditions for allotment are also a part of this printed application, which is in the shape of a folder. Conditions No. 14 and 16, which are reproduced here-in-below, leave no doubt that the allotment was to be made by defendant No. 1, who is termed as 'Builder' and even the buyer's agreement was to be executed by the plaintiffs in his favour after allotment of flat:-

> "14. The allotment of the flat / shop is entirely at the discretion of the Builder and the Builder has a right to reject any offer without assigning any reason thereof."
>
> "16. The intending Allottee(s) agrees to sign and execute, as and when desired by the Builder, the Flat Buyers Agreement on the Builders standard format."

20. It is true that in condition No. 8 it is mentioned that the owner of the property is Air Marshal G.B. Singh (retd.), defendant No. 2 herein, but this has been stated only for the purpose of making it clear to the plaintiffs that the land, on which the flat is built, shall remain the property of defendant No. 2 and green areas and other vacant areas shall also remain his property.

21. Learned counsel stated that according to this clause 8, the sale deed or in case of the allottee being not entitled to sale, on account of bar of Section 118 of the H.P. Tenancy & Land Reforms Act or for any other disability, lease deed for ninety-nine years was to be executed by the owner and thus it was known to the plaintiffs that for an agreement of sale or lease of ninety-nine years, they had to have an agreement with the owner, i.e.

defendant No. 2. It is apposite to notice condition No. 8, which is reproduced below:-

> "8. The land on which the Flat/Shop are built, will remain the property of the owner, Air Marshal G.B. Singh, PVSM (Retd.) (hereinafter referred to as the "Owner"). The green areas i.e. all areas within Dilshant Estate on which flats/shops and other structures have not been built shall remain the property of the owner and the allottee shall only have a right/license to use the green areas and shall have no right whatsoever to ownership of the said green areas and shall not have any right to occupy or make any construction whatsoever on the said green areas. The allottee(s) will be entitled to have the residential Flat/commercial shop transferred in his/her own name through a regular sale deed if the Allottee(s) is entitled to purchase the same under section 118 of the Himachal Pradesh Tenancy and Land reforms act, 1972 or after obtaining necessary permission in other cases. Where no permission is obtained or the allottee is not entitled to have the sale deed executed in his/her favour the "Owner" shall execute a 99 years lease and with a right to sub-lease etc. and all other incidental rights enjoyed by a flat/shop owner in favour of the allottee(s). All expenses or cost in this behalf shall be borne by the allottee(s)."

22. Even a casual reading of condition No. 8 shows that the allottees are not required to enter into any agreement with the owner, but they have the right, after completion of the formalities, to have executed sale deed or lease deed of 99 years, as the case may be, from the owner.

23. After the submission of the application and its acceptance by defendant No. 1, the plaintiffs paid Rs.50,000/- in cash on 28.8.1995 against receipt Ext. PW-1/B furnished by DW-3 Capt. P.S. Chimni in his capacity as Director of defendant No. 1. A sum of Rs.10,000/- had been

paid through a bank draft along-with the application Ext. PB and a receipt for that amount was issued on 30.8.1995. The same is Ext. PW-1/C. On 6.11.1995 a communication was addressed by defendant No. 1 to plaintiff J.N. Sharma, calling upon him to send a bank draft of Rs.50,000/- to complete the earnest money in order to enable defendant No. 1 to issue allotment letter. The plaintiffs sent the bank draft for the aforesaid amount of money promptly. Defendant No. 1 acknowledged the receipt of the said draft on 11.12.1995. The receipt is Ext. PW-1/E. Despite having received the bank draft for Rs.50,000/-, defendant No. 1 did not fulfil the assurance regarding allotment of flat as held out in the letter dated 6.11.1995 Ext. PW-1/D. The plaintiffs by sending bank draft for Rs.50,000/- in response to letter dated 6.11.1995 received from defendant No. 1, became entitled to the allotment of the flat, in question. Further, the sending of the bank draft for Rs.50,000/- by the plaintiffs led to a concluded agreement between the plaintiffs and defendant No. 1 for the allotment of flat No. C-12 by defendant No. 1 in favour of the plaintiffs.

24. Defendant No. 1 instead of allotting the flat after having received the full earnest amount from the plaintiffs, sent a letter dated 9.9.1996 (Ext. PW-1/F) on 12.9.1996 to plaintiff J.N. Sharma, forwarding therewith a cheque for Rs.60,000/-, on account of refund of booking money and conveying that the booking stood cancelled as desired by him vide letter dated 9.9.1996. As a matter of fact, neither of the plaintiffs had sent any letter to defendant No. 1 for the cancellation of the booking. Defendant No. 1, along-with the letter Ext. PW-1/F, sent the draft of a letter purporting to have been written by plaintiff J.N. Sharma to defendant No. 1 expressing therein his wish for the cancellation of booking and seeking refund of an

amount of Rs.60,000/-. DW-3 Capt. P.S. Chimni, while in the witness box, had no option but to admit that along-with letter Ext. PW-1/F he had sent a draft of letter addressed to defendant No. 1 by the plaintiff. The explanation he offered was that the plaintiffs had discussed the matter with him on telephone and when he expressed his inability to complete the project because of a stay issued by the Hon'ble High Court in a writ matter, plaintiff J.N. Sharma asked for cancellation of the booking and the refund of the money.

25. It is clear from the record that the aforesaid story regarding the plaintiffs' having approached defendant No. 1 for cancellation of the booking and the refund of the earnest money is concocted. As already noticed, the plaintiffs had paid to defendant No. 1 a sum of Rs.1,10,000/- towards booking amount. Rs.10,000/- were paid by a bank draft at the time of submission of the application. Rs.50,000/- were paid in cash on 28.8.1995 against writing Ext. PW-1/B. The remaining amount of Rs.50,000/- had been paid in response to letter Ext. PW-1/D by means of a bank draft, the receipt of which was acknowledged vide Ext. PW-1/E by defendant No. 1. However, defendant No. 1 through letter Ext. PW-1/F, dated 9.9.1996 sent a cheque for Rs.60,000/- only, on account of refund and not the entire amount of Rs.1,10,000/-. Defendant No. 1 has taken the plea that along-with the letter Ext. PW-1/F and the cheque for Rs.60,000/- mentioned therein, Rs.50,000/- in cash were sent to plaintiff J.N. Sharma through one Rajesh Kumar, who has been examined as DW-4.

26. Letter Ext. PW-1/F was sent back by plaintiff J.N. Sharma to defendant No. 1 with a query in his hand and under his signature made below the letter. The defendant was asked the reason for the cancellation

of booking. In response to this query, a letter was written by Capt. P.S. Chimni, which is Ext. PW-1/K. He admits having written this letter. In this letter there is no reference to any telephonic call by plaintiff J.N. Sharma or his having asked for cancellation in the course of such telephonic talk. The explanation offered is that the Environment Commission, appointed by the High Court, had recommended that Blocks C and D should not be permitted to be constructed and because of such recommendation, the construction was likely to be delayed indefinitely or might have to be even abandoned.

27. Regarding the refund of Rs.50,000/- in cash, the evidence of defendant No. 1 is self-contradictory, inconsistent and discrepant. According to the defendants, the letter Ext. PW-1/F and the cheque for Rs.60,000/- and the cash of Rs.50,000/- were sent to plaintiff J.N. Sharma through DW-4 Rajesh. Rajesh does not speak of having carried the letter and the cheque, but has stated only about the cash of Rs.50,000/-. Further, in letter Ext. PW-1/P, written by Capt. P.S. Chimni to plaintiff J.N. Sharma, it is stated that Rs.50,000/- in cash had been refunded to him on 23.9.1996, but the pleaded version of defendant No. 1 is that the money was handed over to plaintiff J.N. Sharma by DW-4 Rajesh on 12.9.1996. As if this was not enough, DW-3 Capt. P.S. Chimni, when confronted with the fact why there was no mention of an amount of Rs.50,000/- being sent in cash, in letter Ext. PW-1/F, came out with another version and stated that the cash payment of Rs.50,000/- had been made to plaintiff J.N. Sharma a few days prior to the sending of the cheque for Rs.60,000/-.

28. The above discussion clearly shows that the entire story regarding the cancellation of the booking at the instance of plaintiff J.N. Sharma and the refund of Rs.50,000/- in cash is concocted.

29. Main thrust of the defendants' case is that defendant No. 2 is the owner of the property and there being no agreement between the plaintiffs and defendant No. 2, the plaintiffs cannot seek specific performance of the contract for allotment / transfer of the flat, in question, on the strength of the alleged agreement between them and defendant No.1.

30. Though both the defendants No. 1 and 2 have categorically pleaded and even during the course of the hearing it was very strenuously urged that defendant No. 2, being owner of the flat and there being no agreement between the plaintiffs and defendant No. 2, no legally enforceable agreement could be said to be in existence and hence the plaintiffs were not entitled to the relief of specific performance, yet neither of the two defendants has alleged in its / his written statement that defendant No. 1 did not have any authority to enter into agreement for the allotment / sale / lease for 99 years of the flat on behalf of defendant No. 2. Defendant No. 2 nowhere in his written statement says that defendant No. 1 had no authority to negotiate and enter into deals for the allotment / sale / lease of the flats on his behalf. It appears that defendant No. 2 could not have said so, because in the advertisement, which appeared in the newspapers, defendant No. 1 and defendant No. 2 were among the named persons, who were to be contacted for allotment of flats. Not only this, there were printed applications addressed to defendant No. 1 and the plaintiffs applied for the allotment of flat on the said printed format of application Ext. PB. Defendant No. 2 in his written statement has referred to condition No. 8 of terms and conditions attached to the application, and very much relies upon it, when he says that he was the owner of the flat to the knowledge of the

plaintiffs. This shows that defendant No. 2 was in the know of the fact that defendant No. 1 had got printed the applications and terms and conditions forming part of the applications for allotment / sale of the flats. He has nowhere pleaded that defendant No. 1 had got the applications and the terms and conditions printed without his authority or that by doing so it has committed any breach of supposed agreement / understanding between him and defendant No. 1. Rather he implicitly admits that defendant No. 1 had been acting in this behalf under his authority.

31. It was submitted on behalf of the defendants that according to condition No. 8, which has already been reproduced hereinabove, only defendant No. 2 was the owner and he alone could have executed the sale deed or lease deed. A bare reading of condition No. 8, reproduced hereinabove, shows that no agreement was required to be entered into by the intending allottees with defendant No. 2, the owner of the property. Condition No. 8 simply says that defendant No. 2 was to remain the owner of the flats / shops and the vacant / open spaces and that the allottee was entitled to have the sale deed, or in case the allottee was not eligible to purchase the flat, the lease deed for 99 years, executed from the owner. As a matter of fact, this condition creates a right in the allottee to have the sale deed or the lease deed executed from the owner after the allotment and it is for defendant No. 1 to get the sale deed or the lease deed for 99 years, as the case may be, executed in favour of the plaintiffs from the owner, i.e. defendant No. 2. The condition nowhere says that the allottee shall have to enter into an agreement with the owner to be entitled to have the sale deed or the lease deed for 99 years, as the case may be, executed in his favour.

32. The plea put-forward by the defendants that it was only defendant No. 2, who could have entered into an agreement for the allotment and transfer of the flat, is demolished even by their own pleadings and evidence. It is the case of defendants No. 1 and 2 that flat No. C-12 has now been allotted and sold to defendant No. 3. They have pleaded that defendant No. 3 had entered into an agreement for the purchase of the said flat with defendant No. 2. Similar is the plea of defendant No. 3 in the written statement. However, defendant No. 3, while in the witness box as DW-5 has admitted that the price has been paid by him to defendant No. 1 and the papers for the allotment were also submitted to the said defendant No. 1. That means even when an intending allottee negotiated with defendant No. 2, the alleged owner of the property, formal agreement was entered into by the said allottee with defendant No. 1 and it was the latter who received the money and executed the writings / papers pertaining to the allotment / transfer.

33. The above stated position apart, the defendants have not produced on record the agreement that is supposed to have been executed between them (defendants No. 1 and 2). Admittedly, defendant No. 1 is a builder and it had been offering flats for allotment / sale to the public. If that is so, there must have been an agreement between defendant No. 1 and defendant No. 2 thereby authorizing defendant No. 1 to negotiate and enter into agreements regarding the allotment / sale / lease of the flats. No such agreement has been produced by the defendants. Therefore, they are liable to an adverse inference to the effect that through the agreement defendant No. 2 has authorized defendant No. 1 to enter into agreements for the allotment / sale / lease of the flats and the agreements so entered

into by defendant No. 1 on behalf of defendant No. 2 are binding on the latter.

34. It was also alleged on behalf of the defendants that even according to the plaintiffs' own showing, there existed no agreement between them and defendant No. 1. It was contended that as per terms and conditions attached to the application Ext. PB, first a letter of allotment was to be issued and thereafter, vide condition No. 16, the allottee had to execute buyer's agreement on the builder's standard format. It was stated that no allotment letter had been issued nor had the plaintiffs executed the buyer's agreement and thus there existed no legally enforceable agreement between the parties.

35. The argument has been noticed only to be rejected. Defendant No. 1 addressed a letter to plaintiff J.N. Sharma, after acceptance of the application, on 6.11.1995 Ext. PW-1/D calling upon him to send a draft of Rs.50,000/- to complete the earnest money, so that letter of allotment was issued in his favour. The plaintiffs deposited the money on 11.12.1995 against receipt Ext. PW-1/E. Thus, the issuance of allotment letter on the payment of additional amount of Rs.50,000/-, became just a formality to be completed by defendant No. 1. The plaintiffs having paid the entire amount demanded for allotment, became legally entitled to the issuance of letter of allotment in their favour. Defendant No. 1's failure to issue the letter of allotment and instead addressing the plaintiffs a letter dated 9.9.1996 Ext. PW-1/F and thereby unilaterally cancelling the booking and seeking to refund Rs.60,000/- by a cheques, as already discussed at length hereinabove, gave the plaintiffs a cause of action to seek specific performance of the agreement, which as already stated hereinabove, stood

completed with the acceptance of the application Ext. PB and in any case on payment of additional amount of Rs.50,000/-, demanded by defendant No. 1 through letter dated 6.11.1995 Ext. PW-1/D. After issuance of the allotment letter it was for defendant No. 1 to have called upon the plaintiffs to execute the buyer's agreement in terms of condition No. 16 of the terms and conditions, attached with the application Ext. PB and then to get the conveyance deed (either sale deed or lease deed for 99 years) executed in favour of the plaintiffs from defendant No. 2.

36. During the course of hearing of the suit, pointed attention of the Court was drawn to the following portion of condition No. 11 and it was urged that it was in exercise of the right reserved by this portion of condition No. 11 that the allotment had been cancelled:-

> "……If for any reason the builder is not in a position to allot the property applied for, the builder shall refund the earnest money and instalments deposited with simple interest @ 9% per annum."

37. A bare look at the aforesaid portion of condition No. 11 suggests that the builder had to have some reason for his not being in a position to allot the property applied for. In the present case defendant No. 1 did not have any reason. In fact the reasons stated by it were a ruse to avoid the agreement. It was alleged that the Hon'ble High Court in a writ petition had initially stayed the construction of block-C and ultimately cancelled it. But the fact is that block-C has been constructed, including flat No. C-12, which was agreed to be allotted to the plaintiffs. So the contention is rejected.

38. It is also the plea of the defendants that there is no written agreement between the plaintiffs and defendant No. 1 and hence the relief

of specific performance can neither be sought nor granted. As discussed hereinabove, the making of the application by the plaintiffs and its acceptance by defendant No. 1 resulted in an agreement in writing. This apart, it is not the requirement of law that the agreement, sought to be got specifically performed by a suit, should be in writing. In this view of the matter I find support from a judgment of the Hon'ble Supreme Court in **Brij Mohan & Ors. Vs. Smt. Sugra Begum & Ors. , [JT 1990 (3) S.C. 255].**

39. A number of contentions have been raised by the defendants in the written arguments. I proceed to deal with them one by one.

40. The first contention is that the plaintiffs have nowhere claimed that they had been having dealings with defendant No. 1 under the belief that it was an authorized agent of defendant No. 2. For two reasons the contention requires straightway rejection. First, as already noticed, joint advertisements appeared in the newspapers in which defendant No. 1 and defendant No. 2 and one more person were mentioned as the persons to be contacted for booking. Then there were applications in printed forms addressed to defendant No. 1 and as per the contents of the said application and the terms and conditions attached thereto, it was defendant No. 1 who was to accept the application, to receive the money, to issue the allotment letter, to get executed buyer's agreement and then to get executed sale deed or lease deed, as the case might be, in favour of the allottee. No doubt in the conditions it is not specifically mentioned that defendant No. 1 had undertaken to get sale deed or lease deed executed in favour of the plaintiffs from defendant No. 2, but the mention in condition No. 8 that the allottee will be entitled to the execution of the sale deed or lease deed in his favour by defendant No. 2, leaves no doubt that defendant

No. 1 had undertaken to get the sale deed or lease deed executed, because the agreement was between it and the plaintiffs.

41. Secondly, as discussed in detail hereinabove, neither of the two defendants, i.e. defendant No. 1 and defendant No. 2, has pleaded or proved that defendant No. 1 had no authority to enter into an agreement for the allotment and sale / lease of the property on behalf of defendant No. 2. They have also not placed on record the agreement under which defendant No. 1 was holding out to the public that it had the authority to allot and transfer the flats and had been getting addressed to itself and accepting the applications for allotment and transfer of the flats. More over, defendant No. 2 has nowhere stated in his written statement that defendant No. 1 was not authorized by him to offer the flats for allotment / transfer and hence the agreement does not bind him. Hence, the presumption is that defendant No. 2 had authorized defendant No. 1 to offer the flats to the public and also to enter into agreements for the allotment / sale / lease of the flats on his behalf. If that is so, both the defendants No. 1 and defendant No. 2 are estopped from pleading that there is no legally enforceable agreement for the allotment / transfer of the flat, on account of there being no agreement between them and defendant No. 2, the owner of the property.

42. It is also the contention of the defendants that there was no definite and specific agreement between the plaintiffs and defendant No. 1 inasmuch as the exact area of the flat was not known nor had the mode of payment of price been finalized and that the matter was still at the stage of negotiations. This contention is also without any merit. In the application Ext. PB, the area is mentioned as ‘990 square feet approximately’. Word ‘approximately’ is printed while the area ‘990’ in figure is written in hand.

Column No. 6 of the application pertains to payment plans. Three options 'A' 'B' & 'C' are given. 'A' and 'C' are scored out. That means the plaintiffs had opted for 'B' plan. Thus the plaintiffs had offered to pay the price in accordance with one of the three alternative plans offered by defendant No. 1. As already noticed, defendant No. 1 accepted the application for the flat, in question. The details of flat are given in the endorsement of acceptance made on the application and duly signed by an authorized signatory of defendant No. 1. As per these details, the plaintiffs had booked flat No. C-12 on the first floor in Block-C, having super area of 990 square feet approximately, at the rate of Rs.1020/- per square foot and the payment plan was 'B'.

43. In view of this factual position, it does not lie in the mouth of defendant No. 1 to say that there was no concluded agreement and the parties were still at initial stage of negotiations or the plaintiffs were only intending allottees. They were intending allottees until the acceptance of their application. This is admitted even by defendant No. 2 in his written statement, when he says that the plaintiffs were only intending allottees up to 28.8.1995. He does not say that they were intending allottees even subsequent to this date. Perhaps he knows that when the plaintiffs' application had been accepted by defendant No. 1, the plaintiffs crossed the stage of being just intending allottees.

44. Another contention raised by the defendants is that it had yet not been settled whether it would be a case of sale or 99 years lease. The contention again is without merit. Condition No. 8 makes it plainly clear that in case the allottee is not an agriculturist in the State of Himachal Pradesh and bar of Section 118 of the H.P. Tenancy & Land Reforms Act is

applicable or there is any other bar, then he will not be entitled to execution of sale deed in his favour, but only a lease deed for 99 years. That means the agreement makes it clear that in case bar is not applicable, the plaintiffs will be entitled to the execution of the sale deed in their favour and if bar applies, they will be entitled only to 99 years lease.

45. In view of the above stated factual position and finding, the rulings relied upon by the defendants' counsel in support of the aforesaid contentions as also the contention that there was no legally enforceable agreement between the plaintiffs and the defendants and referred to in the written submissions are not attracted to the present case and hence need not be even referred to.

46. During the course of the arguments the Court happened to make an observation that the principle underlying Section 41 of the Transfer of Property Act might also be applicable as defendant No. 1 had been acting as an ostensible owner. In view of the findings of facts, recorded hereinabove, particularly the finding that defendant No. 2 does not deny that defendant No. 1 acted on his behalf in the matter of acceptance of the application of the plaintiffs for booking of the flat and entering into an agreement for the allotment / transfer of the flat to the plaintiffs, aforesaid observation during the course of the hearing of the suit, becomes irrelevant. Hence the submissions made by the defendants and the rulings relied upon by them to counter the aforesaid observation of the Court need not be noticed.

47. As an upshot of the above discussion, observations and findings, it is held that there has been an agreement for allotment / sale or 99 years lease of flat No. C-12 between the plaintiffs and defendant No. 1,

who apparently acted on the authority of defendant No. 2. Issue is answered accordingly.

Issue No. 11.

48. Though a plea has been raised by defendant No. 3 that he has purchased the flat, in question, and that he is a bona fide purchaser for consideration and without notice and defendants No. 1 and 2 have also stated that the flat stands sold to defendant No. 3, yet defendant No. 3, while in the witness box as DW-5, has very categorically stated that the flat has not been transferred in his name so far and that it is still in the name of defendant No. 2. Not only this, no document has been proved nor even placed on record indicating that there is even an agreement for the transfer of the flat by defendants No. 1 and 2 in favour of defendant No. 3.

49. In view of the above stated position, the issue is answered in favour of the plaintiffs and against the defendants.

Issue No. 2.

50. Plaintiffs have very categorically pleaded in para 10 of the plaint that they are still ready and willing to perform their part of the agreement. Plaintiff Jatender Nath, while in the witness box as PW-1, testified that the plaintiffs have always been ready and willing to pay the balance price of the flat. In view of the fact that the plaintiffs are ready and willing to perform their part of the contract, that is to say, they are ready and willing to pay the balance price of the flat and in view of the finding on issue No. 1, it is held that the plaintiffs are entitled to the relief of specific performance of the agreement for the allotment and sale or in the case of there being any legal bar to the sale, to 99 years lease of the flat, in question. Issue is answered accordingly.

Issue No. 3.

51. In view of the findings on issues No. 1 and 2, this issue is also answered in favour of the plaintiffs and against the defendants.

Issue No. 4.

52. As noticed in the discussion under Issue No. 1, the application for allotment of flat, submitted by the plaintiffs to defendant No. 1, was accepted on 28.8.1995. On 12.9.1996 letter Ext. PW-1/F was addressed by defendant No. 1 to plaintiff J.N. Sharma, thereby seeking to cancel the booking unilaterally. Then there had been some correspondence between the plaintiffs and defendant No. 1. Even legal notices were served by the plaintiffs upon defendant No. 1. Ultimately vide letter dated 2.12.1996 defendant No. 1 agreed to restore the booking on the condition that cheque for Rs.60,000/-, sent on 12.9.1996, be returned and a receipt of Rs.50,000/- allegedly refunded on 23.9.1996, be acknowledged. As held under issue No. 1, defendant No. 1 did not refund the amount of Rs.50,000/- in cash and, therefore, the plaintiffs were not supposed to acknowledge receipt thereof. As regards the cheque, they had already conveyed to defendant No. 1 that they would not be seeking its encashment nor have they encashed it. Therefore, the conditions mentioned in this letter dated 2.12.1996 Ext. PW-1/P, thereby reviving the booking of flat, which had been unilaterally cancelled by defendant No. 1, are meaningless and this letter is required to be taken to mean acknowledgement of the right of the plaintiffs created by acceptance of application Ext. PB on 28.8.1995. Therefore, the limitation is to be counted from the date of this letter, i.e. 2.12.1996. Limitation for a suit for specific performance of contract is the date fixed for performance or where no date is fixed, when the plaintiff has notice that the

performance is refused. In the present case no date for performance is fixed and, therefore, the limitation is to begin to run when the plaintiffs has the notice of refusal of performance by the defendants. In the present case, no doubt, vide letter dated 9.9.1996, received by the plaintiffs on 12.9.1996, performance had been refused, when the booking was cancelled, but the plaintiffs then had correspondence with defendant No. 1 and it restored the booking vide letter dated 2.12.1996. Thereafter the performance was refused in their reply Ext. PW-1/Z, dated 22.12.1998, to legal notice Ext. PW-1/T, dated 7.7.1998 and another notice Ext. PW-1/W, dated 1.12.1998. The suit was filed on 1.3.1999 or say within three years of the refusal. Initially the suit was only against defendant No. 1. When defendant No. 1 took the objection that defendants No. 2 and 3 were necessary party, amended plaint was filed on 2.6.1999, with the leave of the Court, therein impleading defendants No. 2 and 3. The amended plaint was also within time, because as noticed hereinabove, the performance was refused in December, 1998. The suit is thus well within time. Issue is, therefore, answered in favour of the plaintiffs.

Issue No. 5.

53. Plaintiffs are alleged to have known from the very beginning that defendant No. 2 is the owner of the property. As noticed in the discussion under issue No. 1, defendant No. 1 had the authority to enter into agreement for the allotment / sale or lease of the flats on behalf of defendant No. 2. Further more, in the advertisement it was clearly held out that defendant No. 1 was one of the persons, who were to be contacted. The plaintiffs contacted the said defendant, who then supplied them the printed form of application, which was addressed to it (defendant No. 1).

The plaintiffs filled in that application and submitted it to defendant No. 1. They did not have any dealings with defendant No. 2. Booking / earnest money was also received by defendant No. 1 from them. The application was also accepted by defendant No. 1. Under these circumstances, the plaintiffs cannot be said to have suppressed any material fact by not stating that defendant No. 2 is the owner of the property.

54. For the foregoing reasons, the issue is answered against defendant No. 1.

Issue No. 6.

55. As discussed and held under issue No. 1, the agreement between the plaintiffs and defendant No. 1 entitles the plaintiffs to have the conveyance deed executed from defendant No. 2. It is for the defendant No. 1, as its part of the contract, to get executed the sale deed or lease deed in favour of the plaintiffs from defendant No. 2. Therefore, the suit cannot be said to be liable to be dismissed, because condition No. 8 of the application Ext. PB says that the plaintiffs will be entitled to have the sale deed or lease deed executed in their favour from defendant No. 2. This condition creates a right in favour of the plaintiffs and not any liability nor does it cast any shadow on the right created in their favour under the agreement between them and defendant No. 1. So the issue is answered against the defendants.

Issues No. 7 & 8.

56. As a result of the discussion under and finding on issue No. 1, both these issues are answered against the defendants and in favour of the plaintiffs.

Issue No. 9.

57. Defendants No. 2 and 3 were impleaded on the objection of defendant No. 1 that they were necessary party and, therefore, it does not lie in the mouths of defendants now to say that the suit is bad for their misjoinder. Hence the issue is answered in favour of the plaintiffs and against the defendants.

Issue No. 10.

58. The plaintiffs have pleaded all the essential facts for a suit for specific performance of contract. So the issue is answered in their favour and against the defendants.

Relief.

59. In view of the above findings, suit of the plaintiffs is decreed with costs and a decree directing defendant No. 1 to allot flat No. C-12, block-C in Dilshant Estate Bharari, Shimla in favour of the plaintiffs and then to make an offer to the plaintiffs to execute buyer's agreement in its favour and if the plaintiffs execute such an agreement in accordance with the terms and conditions of allotment within a month of such offer, to get executed sale deed or ninety-nine years lease deed, as the case may be, in their favour from defendant No. 2. Defendant No. 1 is also directed to hand over possession of the aforesaid flat to the plaintiffs.

Decree sheet be prepared accordingly.

Nov. 3, 2006 (BC) **(Surjit Singh)**
Judge